

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

GREGORY S. REISING

Gary, Indiana

ATTORNEYS FOR APPELLEE
STATE OF INDIANA:

STEVE CARTER

Attorney General of Indiana

FRANCES H. BARROW

Deputy Attorney General

Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ANDY'S TRUCK & EQUIPMENT CO., INC.,)

Appellant,)

vs.)

No. 45A03-0712-CV-562

STATE OF INDIANA and COMMISSIONER)
OF LAKE COUNTY, INDIANA,)

Appellees.)

APPEAL FROM THE LAKE SUPERIOR COURT

The Honorable Elizabeth F. Tavitias, Judge

Cause No. 45D03-0509-PL-73

May 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Andy's Truck & Equipment Co., Inc. ("Andy's") appeals the denial of a motion to correct error that challenged the grant of an Indiana Trial Rule 60(B) motion filed by the State of Indiana ("the State")¹ to set aside a judgment that quieted title to a parcel of real estate in Andy's. We reverse.

Issue

Andy's presents five issues for review, which we consolidate and re-state as a single issue: whether the trial court erred in granting the State equitable relief pursuant to Trial Rule 60(B).

Facts and Procedural History

No evidence was presented at the Trial Rule 60(B) hearing. We are able to glean certain undisputed facts from pleadings and judgments in prior proceedings, as follows. On June 7, 1995, the State acquired, by eminent domain proceedings, Lot 8 in Calumet Homes Gardens in Gary, Indiana. On September 1, 2005, Andy's filed a Complaint to Quiet Title, naming as defendants the State and the Commissioner of Lake County. The complaint stated that Andy's had acquired, through a tax sale, property identified as follows:

PROPERTY ID:	41-49-0123-0010
COMMON ADDRESS:	7038 BLACK OAK ROAD GARY, IN 46406
LEGAL DESCRIPTION:	LOT 8, CALUMET HOMES GARDEN ADDITION, GARY, CALUMET TOWNSHIP INDIANA

¹ The Commissioner of Lake County did not join in the Trial Rule 60(B) motion and is not an active party to this appeal.

(App. 40.) The complaint stated that public records showed a possible interest in the property by the State pursuant to a judgment rendered June 7, 1995 in Cause No. 45D04-9411-CP-892 in Judgment Document 95032361 in the Lake Superior Court. Andy's further alleged that the State's interest was extinguished by the Auditor of Lake County's issuance of a Tax Title Deed dated August 22, 2001 and recorded September 4, 2001.

On October 18, 2005, the State answered the complaint to quiet title, admitting that the State had an interest in the subject property and denying that the State's interest was extinguished by a tax title deed granted by the Lake County Auditor on August 22, 2001 and recorded September 4, 2001. On June 14, 2006, the State filed a "Disclaimer to Plaintiff's Complaint to Quiet Title" stating that it disclaimed all interest in the subject property. (App. 16.)

On July 7, 2006, the Lake County Superior Court issued an order quieting title to the subject property in Andy's. The trial court's order stated in relevant part: "the Defendant, Lake County Commissioner, is in default at this matter and the Defendant State of Indiana has offered no defense." (App. 14.)

On February 1, 2007, the State moved to set aside the order quieting title and set aside the tax sale. The State alleged that the Commissioner of Lake County had provided no notice of the tax sale and that the tax sale was void. The State averred that it had checked its records when the quiet title action was pending, the check had revealed no interest in property known as 7038 Black Oak Road, Gary, Indiana, and the State accordingly filed a disclaimer of interest in the matter.

On May 16, 2007, the trial court conducted a hearing on the motion to set aside the quiet title judgment, at which argument of counsel was heard. On May 21, 2007, the trial court granted the State relief pursuant to Trial Rule 60(B) and set aside the order quieting title to the subject property in Andy's. The trial court found that mistakes by the Auditor of Lake County resulted in a void tax sale. On June 19, 2007, Andy's filed a motion to correct error. On October 18, 2007, the trial court denied the motion to correct error. This appeal ensued.

Discussion and Decision

A motion made under Trial Rule 60(B) is addressed to the equitable discretion of the trial court, circumscribed by the eight categories listed therein. Ind. Ins. Co. v. Ins. Co. of N. Am., 734 N.E.2d 276, 278 (Ind. Ct. App. 2000), trans. denied. The burden is upon the movant to establish grounds for relief. Id. at 279. The rule is meant to afford relief from circumstances that could not have been discovered during the period a motion to correct error could have been filed. Id.

In ruling on a Trial Rule 60(B) motion, the trial court must balance the alleged injustice suffered by the party moving for relief against the interests of the winning party and societal interest in the finality of litigation. Id. at 278-79. On appeal, we will not find an abuse of discretion unless the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or is contrary to law. Wheatcraft v. Wheatcraft, 825 N.E.2d 23, 30 (Ind. Ct. App. 2005).

The State did not specify the category of Trial Rule 60(B) implicated; however, it is apparent from argument of counsel that the State urged the trial court to find excusable

neglect pursuant to Trial Rule 60(B)(1), which provides:

On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons: mistake, surprise, or excusable neglect[.]

The State's position was that it did not timely learn of its eminent domain judgment because of address confusion. According to counsel, the State filed its disclaimer after it conducted a records search using an address of 7036 Black Oak Road as opposed to 7038 Black Oak Road and determined that the State had no interest in the property in which Andy's sought to quiet title. The State presented no testimony or other evidence on the State's record-keeping procedures.

Even assuming the truth of the assertion that the State's records of its judgments are accessible only by address, this does not necessarily amount to a showing of excusable neglect. The complaint to quiet title included the legal description of the subject property and specifically identified the cause number, judgment docket number, and date of the State's eminent domain judgment, such that the State could have clearly ascertained its interest in the subject property (if any) with reasonable effort. Documents attached to the State's Trial Rule 60(B) motion (presumably retrieved from State files) show a correct property address.² The State's failures to diligently examine the quiet title complaint and the State's own records, albeit neglectful, do not constitute extraordinary circumstances justifying equitable relief for excusable neglect.

Additionally, the State implicitly pursued an independent ground for relief under

² The address of one prior owner is listed as 7036 Black Oak Road.

subsection (8) of T.R. 60, which provides:

On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons: any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

The party seeking relief from judgment must affirmatively demonstrate extraordinary circumstances to come within the purview of Trial Rule 60(B)(8). Rissler v. Lynch, 744 N.E.2d 1030, 1034 (Ind. Ct. App. 2001).

The State asserted that the original tax sale was void, in reliance upon Indiana Code Section 6-1.1-10-2, which provides: “Except as otherwise provided by law, the property owned by this state, a state agency, or the bureau of motor vehicles commission is exempt from property taxation.” Accordingly, if the State owned the property at issue, in the absence of a statutory exception to 6-1.1-10-2, the Commissioner of Lake County was not entitled to sell the property because of unpaid property taxes.

It would appear that the State was entitled to pursue this defense in the quiet title action. See Bank One Trust No. 386 v. Zem, Inc., 809 N.E.2d 873, 878 (Ind. Ct. App. 2004) (observing that one of the ways to defeat title conveyed by tax deed is to prove the real property was not subject to the taxes for which it was sold), trans. denied. In the quiet title proceedings, the trial court could have examined the factual basis for a claim of ownership by the State. However, the State chose not to claim ownership, but instead claimed that it had no interest in the property sold at the tax sale. Title was quieted in Andy’s based upon the uniform representations of the parties: Andy’s purchased property the State did not own.

Subsequently, in equitable proceedings, the State contended that the underlying tax sale (not the quiet title judgment)³ was void because of the State's ownership and non-liability for property taxes. However, despite taking a position wholly contrary to its position in former litigation, in seeking to avoid its disclaimer, the State presented absolutely no testimony or other evidence to show ownership of the subject property. The State was essentially permitted to re-litigate, without testimony or evidentiary exhibits, the merits of a former judgment. Nevertheless, "courts cannot act upon the assumption that a state of facts exists which has not been proved, and which there has been no effort to prove." Muncie Bldg. Trades Council v. Umbarger, 215 Ind. 13, 16, 17 N.E.2d 828, 829 (1938). The trial court erroneously granted the State Trial Rule 60(B) relief in the face of the State's failure to meet its burden of proof.

Conclusion

The State did not establish its entitlement to the equitable remedy of setting aside Andy's title.

Reversed.

FRIEDLANDER, J., and KIRSCH, J., concur.

³ The State did not specifically allege to the trial court, pursuant to Trial Rule 60(B)(6), that the quiet title judgment was void. However, on appeal, the State cites Trial Rule 60(B)(6) in making a cursory argument that it established its entitlement to relief because of a void judgment.